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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 69

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

JACKSONVILLE TERMINAL COMPANY.

ON A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of the Petitioners is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred and twenty-seven national and international unions having a total membership of approximately thirteen million working men and women. Its affiliates include two of the three Petitioners in the instant case and many other unions rep-

resenting railroad and airline workers as well. Nevertheless, the Federation has rarely filed briefs *amicus* in cases involving the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C., §151 *et seq.* recognizing that they normally present special problems growing out of a "state within a state . . . [having] its own customs and its own vocabulary [which] lives according to rules of its own making." *Garrison, The Railroad Adjustment Board: A Unique Administrative Agency,* 46 Yale L.J., 567-569 (1937). However, it is our belief that the instant case turns on basic propositions of law already fully developed by this Court in decisions construing the nature and effect of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 *et seq.* Since the AFL-CIO has been intimately associated with the development of these principles, we venture an expression of our views as to the correct resolution of the problem presented here in light of the NLRA law declared by this Court.

SUMMARY OF ARGUMENT

The basic question presented by the instant case is: Can peaceful picketing in furtherance of the right of self-help during a major dispute under the Railway Labor Act, which takes place at a situs used by both the struck railroad and other carriers, be limited pursuant to state law to activity directed to the striker replacement employees of the struck carrier, thereby prohibiting conduct designed to appeal to employees of other carriers who are facilitating the day-to-day business of the struck carrier by making deliveries to and pickups from it, at the situs of the picketing? In light of the principles developed below it is clear that the answer to this question must be in the negative and that the injunction entered below must be dissolved.

1. In *Motor Coach Employees* v. *Missouri,* 374 U.S. 74, 82 (1963) this Court stated that "collective bargaining with a right to strike at its core, is the essence of the federal scheme" of the National Labor Relations Act. While the

NLRA and the RLA differ in many particulars, it is entirely accurate to say that in essence the RLA is a system for ordering labor relations based on collective bargaining, mediation, fact finding and voluntary arbitration with the right to strike at its core, *see Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244 (1966). Congress has underlined its policy of safeguarding the right to strike after the other procedures of the RLA have been exhausted by making the anti-injunction policy of the Norris-LaGuardia Act applicable to railroad controversies to the extent that its purposes "are reconcilable" with those of the RLA, *Brotherhood of R.T.* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 40 (1957). And the decisions under Norris-LaGuardia establish that all peaceful picketing, whether primary or secondary, which grows out of "controversies concerning terms or conditions of employment" (29 U.S.C. §113(c)) was designedly left unregulated by Congress, not only from injunctive relief by the federal courts as its bare terms might indicate, but from all regulations, *see, United States* v. *Hutcheson*, 312 U.S. 219 (1941). The plan of the RLA, the Norris-LaGuardia Act and the Clayton Act thus indicates that Congress has found regulation of the timing of self-help to be sufficient to accomplish its purposes in regulating the labor relations of the railroad industry. Congress has, therefore, deliberately refrained from embarking on the detailed regulation of economic weapons found in Section 8 of the NLRA, preferring instead to give the parties a free hand in self-help unless their activities contravene a basic command of the RLA.

The same conclusion follows from the structure of the RLA alone. In enacting the RLA, the Government has not undertaken "governmental regulation of wages, hours or working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them," *Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284, 289-290 (1963), *cf., National Labor Relations*

Board v. *American Nat. Ins. Co.*, 343 U.S. 395, 402 (1952). From the first, it has been recognized that this federal system of labor relations, based on free collective bargaining, bars the application of state laws that would add preconditions to the right to strike not contained in federal law, *see, International Union UAW* v. *O'Brien*, 339 U.S. 453, 458 (1950). Not only is state law regulating the basic right to strike preempted, but state law which does not regulate the strike in terms but does regulate the basic component element of that right—peaceful picketing protected by Sections 7 and 13 of the NLRA—is also preempted. For "picketing has been equated with striking for the purposes of Section 13," *National Labor Relations Board* v. *Drivers Local Union (Curtis Bros.)*, 362 U.S. 274, 281 n. 9 (1960). The decision in *International Union UAW* v. *Wisconsin Employment Relations Board (Briggs-Stratton)*, 336 U.S. 245 (1947) relied on by Respondent would appear to indicate however, that at least some peaceful strike activity may be deemed to be unregulated by federal law—there recurrent unannounced work stoppages—and can on that account be regulated by the states. However, the basic approach of *Briggs-Stratton* was reversed on the basis of the primary jurisdiction conception of preemption in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 n. 4 (1959). And it is plain in addition that the rationale of *National Labor Relations Board* v. *Insurance Agents' International*, 361 U.S. 447 (1960) demonstrates that without regard to *Garmon*, the portion of Briggs-Stratton relied on by respondent is no longer viable. For *Insurance Agents* recognizes that "the presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system" of collective bargaining (*Id.* at 482), and on this basis establishes the conclusion, critical here, that courts are warranted in striking an economic weapon from the hands of one of the bargaining parties only where there is a specific warrant from Congress to do so (*Id.* at 498-499).

It seems absolutely plain to us that *Insurance Agents* sounds the death knell not only to Board regulation of economic weapons, which is not based on a specific Congressional mandate, but also to state regulation of those weapons as well. The decision in *Teamsters Union* v. *Morton*, 377 U.S. 252, 260 (1964), which barred the application of state law in damage suits under Section 303 of the Labor Management Relations Act confirms our reading of *Insurance Agents:*

> "If the Ohio law of secondary boycott [were to] be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted §303, the inevitable result would be to frustrate the Congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy."

2. The Respondent's basic position here is that federal law does not regulate "secondary" activity by a railroad union against a railroad company, that such activity should not be considered lawful on the ground that it was designedly left unregulated, and on this basis argues that the injunction based on state law was properly issued here. We think it plain from such decisions as *Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 300 (1959) that the totality of the railway labor law is, at the very least, as solicitous of the right to engage in primary picketing during a lawful strike over a major dispute as is the NLRA. Thus, picketing which this Court has held is primary under the NLRA must be considered primary under the RLA and as such clearly beyond the reach of the states, even if the states are to have some jurisdiction in this general area to interdict "secondary" activity, *cf.*, *Youngdahl* v. *Rainfair*, 355 U.S. 131 (1957). The injunction entered by the Florida courts limited the union to picketing directed at the striker replacement employees of FEC. It barred picketing directed at the employees of the Terminal Company and other

carriers who were making pickups and deliveries to FEC, or otherwise facilitating the day to day operations of the struck carrier, at the situs of the picketing—the general area of the Terminal Company. Thus, the Florida courts took the position that only picketing directed at striker replacement employees who continue to work for the struck employer is primary. It is therefore plain that the decision below is in conflict with federal law for the decision of this Court in *United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, 499-500 (1964) has squarely rejected this restrictive definition of primary activity:

> "The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the employer's regular operations."

ARGUMENT

THE LEGALITY OF PEACEFUL PICKETING GROWING OUT OF A DISPUTE UNDER THE RAILWAY LABOR ACT IS GOVERNED IN ITS ENTIRETY BY FEDERAL LAW WHICH PREEMPTS ALL STATE REGULATION OF SUCH CONDUCT

The instant case is the latest expression of the Florida courts' continued inability to recognize that state regulation of the peaceful concerted labor activities of employees and their unions is invalid if the state regulation and the

applicable federal labor law cannot "move freely within the orbit of their respective purposes without infringing upon one another," *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 207 (1944). Thus, it is Florida which provided the first and the most recent case, *Hill* v. *Florida,* 325 U.S. 538 (1944), *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967) in which this Court has been forced to overturn a state court judgment on the ground that it infringed upon the overall purposes and objectives of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., §151, *et seq.*

In *Hill,* Florida entered an exclusively federal domain by attempting to require unions and their agents to register in order to organize and represent Florida employees covered by the NLRA despite the policy, inherent in that Act, *see* Section 1, of protecting "the 'full freedom' of workers in the selection of bargaining representatives of their own choice" (325 U.S. at 541). And in *Nash* Florida again entered the area of exclusive federal regulation by attempting to deprive employees, who filed unfair labor practice charges with the NLRB, of unemployment compensation to which they would otherwise have been entitled despite the federal policy inherent in the NLRA, *see* Section 8(a)(4), that "all persons with information about such practices [should] be completely free of coercion against reporting them to the Board" (389 U.S. at 238). The NLRA does not deal in particularity with the qualifications of organizers nor does it apply in terms to state action which disadvantages employees. In *Hill* and *Nash,* Florida concluded that this meant that there were gaps in the federal law which it was free to fill as it saw fit. The error in this approach, which this Court corrected, is that it fails to take into account that state action in an area covered by federal law may be invalid, not only when it contravenes a specific provision which deals with the exact question in detail, but also when the state's activities are inconsistent with the overall thrust of the federal scheme,

see generally, Sola Electric Co. v. *Jefferson Electric Co.* 317 U.S. 173, 176 (1942). Florida's trespass in *Hill* is not impossible to understand. The regulation there could be said to be at the periphery of federal concern. In addition, the belief that the industries covered by the NLRA are peculiarly local and, therefore, subject to state control has been strongly held for the greater part of this century. It was not until the late 1930's that Congressional power over their labor relations was definitely settled by this Court, *National Labor Relations Board* v. *Jones & Laughlin S.* Corp., 301 U.S. 1 (1937). After *Hill,* however, the disposition of *Nash* on the state level is more difficult to rationalize, and it is fair to say that that decision indicates a certain reluctance by the Florida courts to follow the teachings of this Court. Florida's handling of the instant case gives added substance to this conclusion. For Congressional power to regulate the railroad industry has never been in doubt, and has been freely exercised, *see e.g., Houston, E. & W.T.R. Co.* v. *United States,* 234 U.S. 342 (1914). And Federal dominance over the labor relations of the railroads has a long and unbroken history, *e.g., In Re Debs* 158 U.S. 564 (1895); *Texas & N.O.R. Co.* v. *Brotherhood Ry. & S.S. Clerks,* 281 U.S. 548, 570 (1930). Finally, the tradition of federal exclusivity in this general area has been emphasized repeatedly by this Court in a variety of contexts, *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907); *Dice* v. *Akron, Canton & Youngstown R.R.,* 342 U.S. 359 (1952); *Railroad Transfer Service* v. *Chicago,* 386 U.S. 351 (1967). It is against this background that Florida's attempt to regulate a basic right guaranteed by the RLA—the right of self-help—must be measured. When this is done the conclusion that the injunction here is the product of the same fatal flaw found in the Florida courts decisions in *Hill* and *Nash* is mandatory.

1. *Statement of the Case.* The factual background of this case is somewhat complex and is set out in full in the

Union's Brief. For the purposes of our argument, the following will, we believe, suffice: In April 1966 after exhausting the processes of collective bargaining, mediation and fact finding of the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C. §151, *et seq.*, without receiving satisfaction, the Petitioners here went on strike against the Florida East Coast Railroad Co. (FEC) (JA 343-345). On May 4, 1966 in furtherance of that strike, the Brotherhood of Railroad Trainmen (BRT) began picketing on public property adjacent to the Jacksonville Terminal Co. (JA 182-183).

The Terminal Company is owned and controlled by four interstate railroad carriers, the FEC, the Atlantic Coast Line R. Co., the Seaboard Air Line R. Co., and the Southern Railway System (JA 309, 287-288, 347-349, 236). It operates a passenger and freight rail terminal facility in Jacksonville, Florida which constitutes the connecting link between the FEC and the other carriers (Defs. Ex. 2, JA 123, 125, 128-129, 151-153).

Pursuant to a special joint venture agreement entered into by the four owners of the Terminal Company each of the owning railroads, including the FEC, is granted an equal right to use in common all of the passenger and freight facilities, plus labor services, of the Terminal Company (Defs. Ex. 2, JA 123, 128-129, 143, 96). Likewise, the joint venture agreement contains numerous provisions which give each owning railroad, including the FEC, effective control over the Terminal Company's operations and employees, for example, by giving each railroad a veto power over the continued tenure of any subordinate official, and by requiring unanimous consent of all for policy decisions, *see, Jacksonville Terminal Co.* v. *Florida East Coast Ry. Co.*, 363 F.2d 216 (C.A. 5th Cir., 1966) *certiorari denied*, 385 U.S. 950.

Exercising its rights under this joint venture agreement, the FEC daily and regularly carries on its business on the

Terminal Company premises, receives and makes deliveries of goods and cars on and by use of Terminal Company premises and facilities, operates its trains over Terminal Company tracks, deals with the public from Terminal Company facilities, maintains and repairs its engines and cars in Terminal Company shops, and receives labor services performed for it by Terminal Company employees (JA 281-282, 284-285, 288-290, 294, 328-330, 340-341, 346-347). In short, as stated by the U.S. Court of Appeals for the Fifth Circuit in *Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.*, 361 F.2d 649, 651 (C.A. 5th Cir., 1966) *affirmed by an equally divided Court,* 385 U.S. 20 (1966), the federal injunction case which grew out of the same picketing at issue here:

> "... despite the legal separateness of the Terminal Company's entity and operation, it cannot be disputed that the facilities and services provided by the Terminal Company *in fact* constitute an integral part of the day-to-day operations of the FEC, which continues to operate both passenger and freight trains by means of its own striker replacement crews." (Emphasis in original.)

All of the points adjacent to the Terminal Co. picketed by the BRT on May 4, 1966 were either places where Terminal Company employees, who are under instruction to work for the FEC, or employees of connecting carriers who were involved in making deliveries to or pickups from the FEC, report to work (JA 99, 96-68, 101-102, 107-108), or the closest place on public property to the areas where interchange (i.e. pickups and deliveries) between FEC and the Atlantic Coast Line Railroad or between FEC and the Seaboard Air Line Railroad is accomplished (JA 63, 199, 317, 340-341, 216-217, 224, 233-234, 316, 303-304, 316).

The picket signs read, "Fellow Railroad Men Do Not Cross or Aid FEC, B of RT On Legal STRIKE AGAINST FEC, Please Make Common Cause With Us In Major Dispute Against FEC" (JA 64-69, 225). There was no mass

picketing, no untoward incident of any kind, and the picketing was entirely peaceful and orderly and did not physically disrupt or interfere with traffic (JA 183, 229). The picketing did have some effect on non-FEC connected rail movements but this was minimal because of the use of supervisors and the BRT through its strike leader, Deputy President Raymond C. Moore, has made it plain that if the picketing had been permitted to continue the Union was willing to take the following step to insure that non-FEC movements were not affected (JA 264):

> "Q. If they stop handling F.E.C. cars, you will take down the picket lines; is that right? A. There would be no purpose of putting the picket lines up. Q. O.K. A. They are for the same purpose, if I may say this, was up to your supervisors the morning of the strike—the supervisors that were present, if they had any trains moving that didn't have any F.E.C. cars on it, to tell the conductors to come up to me, and I would pull down the picket lines when that train moved."

Nevertheless, all the picketing except for that occurring at a separate gate reserved for the striker replacement employees of the FEC was enjoined within a day and has not been permitted to resume. In light of the above-noted facts, the basic question presented comes down to this: Can peaceful picketing in furtherance of the right of self-help during a major dispute under the Railway Labor Act, which takes place at a situs used by both the struck railroad and other carriers, be limited pursuant to state law to activity directed to the striker replacement employees of the struck carrier thereby prohibiting conduct designed to appeal to employees of other carriers who are facilitating the day-to-day business of the struck carrier by making deliveries to and pickup from it, at the situs of the picketing?

2. *The BRT's Picketing Is Beyond The Reach of State Law Even If It Is Considered to Constitute Secondary Activity.* In the federal injunction case which grew out of the same picketing at issue here, *Atlantic Coast Line R.*

Co. v. *Brotherhood of R. Trainmen, supra,* 385 U.S. 20 the Railroads and the Terminal Co. argued that an amalgam of the federal statutes that apply to railway labor disputes, the RLA, Sections 6 & 20 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §12, *et seq.*, and the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §101 *et seq.*, justified an injunction against the BRT's picketing at the Terminal Co. identical in operative terms to the injunction now in force pursuant to Florida state law. The BRT on the other hand argued that the picketing should be considered to be either a protected form of self-help under the RLA or, at the least, activity which was legal because it was designedly left unregulated under that statute and the Norris-LaGuardia Act.[1] Our reading of the briefs is that no one suggested that there was a gap in the federal law which could or should be filled by state law. This Court split 4-4 in the *Atlantic Coast Line* case thereby leaving the legal status of the picketing in question under federal law in doubt, except, of course, that it did settle it as between these parties. Thus barred from securing relief under federal law, and buoyed by the belief that there must be some relief against the picketing here under a natural law against "secondary" activity, the Terminal Co. has now reversed field and argues that there is after all a gap in federal law that Florida has correctly moved to fill. Given the decision in the *Atlantic Coast Line* case the picketing here can only be characterized as conduct designedly left unregulated by federal law, affirmatively protected under that law, or as unregulated activity open to state regulation. We submit that it is not the last of these alternatives and that there is therefore no basis upon which the injunction issued below can be sustained.

In *Motor Coach Employees* v. *Missouri,* 374 U.S. 74,

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[1] The BRT also argued that the picketing might arguably be prohibited by Section 8(b)(4) of the NLRA. It repeats that argument here. We do not treat with this contention for it is unnecessary to reach it under our theory of the case.

82 (1963), this Court stated that "collective bargaining with the right to strike at its core, is the essence of the federal scheme" of the NLRA. While the NLRA and the RLA differ in many particulars, it is entirely accurate to say that in essence, the RLA is a system for ordering labor relations based on collective bargaining, mediation, fact finding and voluntary arbitration with the right to strike at its core. As Mr. Justice Douglas noted in an earlier case involving the FEC's labor problems, *Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244 (1966):

> "The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided.
>
> "At that juncture self-help was also available to the carrier as we held in *Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284, 291: '. . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute. . . .'"

Indeed, Congress has underlined its policy of safe-guarding the right to strike after the other procedures of the RLA have been exhausted by making the anti-injunction policy of the Norris-LaGuardia Act applicable to railroad controversies to the extent that its purposes "are reconcilable" with those of the RLA, *Brotherhood of R. T.* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 40 (1957). And as this Court explained in *Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 338-339 (1960) this process of accommodation of the two statutes requires the absorption into the federal railroad labor policy of the anti-injunction philosophy of Norris-LaGuardia except where "a plain violation of a basic command of the Railway Labor Act" is shown. Injunctions are not warranted in the RLA context "because the conduct of the union is unlawful under some other, non-labor statutes" *(Ibid.)*.

At least *prima facie* then, the plan of the federal law

governing railway labor disputes would appear to be that unions are completely forbidden from exercising self-help until the other processes mandated by the RLA have been exhausted and that they are free to engage in unrestricted peaceful self-help within the railroad industry designed to secure their demands at that point without regard to whether those measures are labeled primary or "secondary." Two lines of analysis support this conclusion. First the decisions under the Norris-LaGuardia Act establish that all peaceful picketing which grows out of a "controversy concerning terms or conditions of employment" (29 U.S.C. §113(c)) was designedly left unregulated by Congress, not only from injunctive relief by the federal courts as its bare terms might indicate, but from all regulation. The critical decision is *United States* v. *Hutcheson*, 312 U.S. 219 (1941), a criminal prosecution under the Sherman Act. There the Carpenters and Machinists Unions became involved in a dispute over erecting and dismantling machinery for the Anheuser-Busch Company. Unable to secure the demanded jobs from Anheuser-Busch, the Carpenters struck not only that company and a construction firm doing work on its premises, but also struck and picketed an adjacent employer who leased land from Anheuser-Busch, and a construction company which was erecting a building for the lessee. The picketing of the adjacent premises was presumably for the purpose of placing additional pressure on Anheuser-Busch in its dispute with the Carpenters. On these facts, this Court held (*Id.* at 233-235):

> "Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restriction which *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 gave to the immunities of §20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms

that no longer leave room for doubt. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U.S. 91, ante. This was done, as we recently said, in order to 'obviate the results of the judicial construction' therefore given the Clayton Act. *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U.S. 552.

* * * *

"To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the Duplex Printing Press Co. case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. . . . That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. . . . The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."

In short just as Congress may, when it chooses to do so, announce a broad federal policy which precludes the application of state law in both state and federal forums by a statute which on its face merely grants the federal courts subject matter jurisdiction, *Textile Workers* v. *Lincoln Mills* 353 U.S. 448 (1957), *Teamsters Local 174* v. *Lucas Flour Co.* 369 U.S. 95 (1962), *Machinists* v. *Central Airlines* 372 U.S. 682 (1963) it is free to accomplish the same

objective in a law which in terms appears to limit the Federal courts equity jurisdiction.

The plan of the RLA, the Norris-LaGuardia Act and the Clayton Act thus indicates that Congress has found regulation of the timing of self-help, always a critical matter in labor relations, *see, American Ship Bldg. Co.* v. *National Labor Relations Board* 380 U.S. 300, 310 (1965); *Liner* v. *Jafco,* 375 U.S. 301, 307-308 (1964) to be sufficient to accomplish its purposes in the railroad industry. Congress has therefore deliberately refrained from embarking on the detailed regulation of economic weapons found in Section 8 of the NLRA, preferring instead to give the parties a free hand in self-help unless their activities contravene a basic command of the RLA, *cf., Railway Employees* v. *Florida E.C.R. Co. supra,* 384 U.S. at 246-248.

It is true that in 1947 Congress decided that experience under the NLRA indicated that the right to employ" secondary" pressure had been abused and moved to correct that abuse in Section 8(b)(4) of the NLRA and Section 303 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §173 *et seq.* But Congress refused to similarly amend the federal law governing railway labor relations. As Senator Taft noted: "there were no abuses which had arisen in connection with the operation of the Railway Labor Act [as to secondary boycotts]. In general, we confined our amendments to the bill to acts which from evidence before the committee were specifically shown to be abuses," 2 Legislative History of the Labor-Management Relations Act 1947 (G.O.P. 1948) 1571. Moreover, while Section 8(b)(4) of the NLRA and Section 303 of the LMRA render the specific types of "secondary" picketing they cover unlawful, Congress was careful to insure that only a governmental agency, expert in labor relations, was empowered to secure injunctive relief. This limitation was considered of critical importance. Thus, Senator Taft stated, (2 Leg. Hist., LMRA 1365):

> "In the progress of the consideration of a bill the Senator in charge of it should judge the temper of the Senate and the action which should be taken. I found that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes, seemed to be so strong, and I am so anxious to retain provisions covering the right of direct action in suits brought for damages in cases of that kind, that I have determined that I shall vote against the Ball amendment and then offer the substitute, which provides for direct suits in cases of secondary boycott. I think that will be a powerful deterrent. While the injunctive process through the National Labor Relations Board is not so direct, it is an injunctive process of a kind; but without the right to sue for damages, there is no recourse for a man who is injured by a secondary boycott." *See generally* 2 Leg. Hist. LMRA 1347-1400.

Yet, here the railroads seek precisely what Congress refused to grant when it amended the NLRA—the right, as a private party to secure an injunction against peaceful concerted activity.

Second, the same conclusion follows from the structure of the RLA alone. In enacting the RLA the Government has not undertaken "governmental regulation of wages, hours or working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them," *Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284, 289-290 (1963), *compare, National Labor Relations Board* v. *American Nat. Ins. Co.*, 343 U.S. 395, 402 (1952). And this system of labor relations presupposes the right to employ economic weapons which are not merely "academic," *Railway Employees* v. *Florida E.C.R. Co.*, *supra*, 384 U.S. at 246, as an integral part of the bargaining process which is set up by federal law. For pursuant to the Congressional plan self-help is considered to be a continuation of the bargaining process just as Bismarck considered war to be a continuation of diplomacy by other means, *compare National Labor Relations Board* v. *Insurance Agents International*, 361 U.S. 47 (1960).

From the first it has been recognized that this federal system of labor relations based on free collective bargaining bars the application of state laws that would add preconditions to the right to strike not contained in federal law. Thus, in *International Union UAW* v. *O'Brien*, 339 U.S. 453, 458 (1950), this Court stated:

> "Even if some state legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the federal Act. The Michigan law calls for a notice given 'In the event the parties . . . are unable to settle any dispute' to be followed by mediation, and if that is unsuccessful, by a strike vote within twenty days, with a majority required to authorize a strike. Under the federal legislation, the prescribed strike notice can be given sixty days before the contract termination or modification. §8(d). The federal Act thus permits strikes at a different and usually earlier time than the Michigan law; and it does not require majority authorization for any strike."

And the states are also barred from prohibiting a strike against a public utility authorized by federal law on the ground that the strike would create an emergency situation that could not be tolerated. For such a justification for state action was explicitly rejected in *Amalgamated Assoc. S.E.R. & M.C.E.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 393-394 (1951):

> "As we have noted, in 1947 Congress enacted special procedures to deal with strikes which might create national emergencies. Respondents rely upon that action as showing a congressional intent to carve out a separate field of 'emergency' labor disputes and, pointing to the fact that Congress acted only in respect to 'national emergencies,' respondents ask us to hold that Congress intended, by silence, to leave the states free to regulate 'local emergency' disputes. . . . Congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting com-

merce. *International Union, United Auto Workers* v. *O'Brien, supra* (339 U.S. at 457). And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law."

See also, Motor Coach Employees v. *Missouri, supra,* 374 U.S. 74.[2]

The foregoing cases demonstrate not only that state law regulating the basic right to strike is preempted but also that state law which does not regulate the strike in terms but does regulate the basic component element of that right —peaceful picketing protected by Sections 7 and 13 of the NLRA is also preempted for "picketing has been equated with striking for the purposes of §13. See *NLRB* v. *International Rice Milling Co.* 341 U.S. 665," *National Labor Relations Board* v. *Drivers Local Union (Curtis Bros.),* 362 U.S. 274, 281 n. 9 (1960); *cf., Local No. 438* v. *Curry,* 371 U.S. 542 (1963). But the decision in *International Union UAW* v. *Wisconsin Employment Relations Board (Briggs-Stratton),* 336 U.S. 245 (1947) relied on by Respondent (Br. in Op. 18) would appear to indicate that at least some peaceful strike activity may be deemed to be unregulated by federal law—there recurrent unannounced work stoppages—and can on that account be regulated by the states. In other words, it can be argued that *Briggs-Stratton* stands for the proposition that the preemption of substantive state law regulating peaceful strike weapons by federal labor law extends only to all protected concerted activity

[2] Nor can the states expend their powers in the field of labor law by relying on their laws governing restraints of trade, *Weber* v. *Anheuser-Busch,* 348 U.S. 468, 481 (1955); *see also Local 24 Teamsters* v. *Oliver,* 358 U.S. 283 (1959). And in light of this Court's decision in *Railroad Telegraphers* v. *Chicago & N.W.R. Co., supra,* 362 U.S. at 339, n. 15, it is also plain that both federal and state transportation acts cannot convert an otherwise legal strike into an unlawful one.

under federal law and not to all peaceful concerted activity deemed unregulated.

There are two answers to the proposition that *Briggs-Stratton* strengthens the case for application of state law here. The first is that the picketing enjoined here is deemed open to state regulation primarily on the ground that it is "secondary," (Br. in Op. 14). This is as it has to be in light of the cases cited on pp. 18-19 *supra*, which taken together, demonstrate that a peaceful strike cannot, as the Florida courts thought (A. 5a) be deprived of its federal protection by "emergency" conditions, state antitrust laws or state transportation acts.[3] Thus, the Terminal Co.'s argument if it is to gain the benefit of *Briggs-Stratton* must be based on the assumption that "secondary" activity is not protected. It is true, of course, that certain specified "secondary" activity is now unlawful under the NLRA and LMRA but prior to the inclusion of the provisions which accomplished that result the weight of federal authority indicated that peaceful concerted "secondary" activity for mutual aid and protection was protected activity under Section 7 of the NLRA. The leading case is *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (C.A. 2nd Cir., 1942) (L. Hand, J.):

> "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the

[3] For example, if the Terminal Co. had been shut down by a lawful strike of its own employees after bargaining had failed and the Terminal Co. was unable to operate without their services the same "emergency" said to exist here would come into being. While the Florida courts have not articulated the basis for applying its restraint of trade law or its transportation law to the controversy here, it is fair to assume that they would be violated in that situation as well, yet it is perfectly plain that state law would not apply.

> outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. So too of those engaging in a 'sympathetic strike,' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in 'mutual aid or protection.' *Cf. Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board,* 7 Cir., 111 F.2d 869, 873, 874. It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained (e.g. *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443, 471, 472, 474) but it seems to us that the act has put an end to this."

There is nothing in *Briggs-Stratton* to indicate that the Court viewed secondary activity as well as recurrent unannounced work stoppages as unprotected activity prior to the 1947 amendments to the NLRA nor do we know of any other decisions which indicate that the Court was in disagreement with Judge Hand's analysis. The structure of the RLA today is comparable to the structure of the NLRA before it was amended and since that structure includes the Norris-LaGuardia Act whose policy is set against the proposition that secondary activity is unlawful, we believe that even if this picketing was "secondary," *but see* pp. 25-32 *infra,* it is, as *Peter Cailler Kohler* holds, protected activity which the states cannot regulate.

Second, the basic approach of *Briggs-Stratton* was reversed on the basis of the primary jurisdiction principle of preemption in *San Diego Building Trades* v. *Garmon,* 359 U.S. 236, 245 n. 4 (1959) *see also National Labor Relations Board* v. *Insurance Agents International, supra,* 361 U.S. at 493 n. 23. Having been interred on that ground in

Garmon was no need for the Court to exhume the body in order to rebury it in *Insurance Agents*. However it is plain that the rationale of *Insurance Agents* demonstrates that without regard to *Garmon* the portion of *Briggs-Stratton* relied on by Respondent is no longer viable. We submit in other words that the decisions of this Court hold that the federal scheme of bargaining with the right to strike at its core demands the absolute preclusion of regulation of peaceful strike weapons on the basis of state law. We start from the essential position developed by Mr. Justice Brennan in *Insurance Agents* (361 U.S. at 482):

> "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as a 'prime motive power for agreements in free collective bargaining.'

> Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess."

After developing this basic point, Mr. Justice Brennan then went on to establish the conclusion, critical here, that courts and administrative agencies are warranted in striking an economic weapon from the hands of one of the bargaining parties only where there is a specific warrant from Congress to do so, *compare, Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. at 338-339. For this approach and this approach alone insures that the delicate balance of considerations upon which a system of free collective bargaining rests will be maintained in equilibrium (361 U.S. at 490, 492-494, 498-499):

> "... We think the Board's approach involves an intrusion into the substantive aspects of the bargaining process—again, unless there is some specific warrant for its condemnation of the precise tactics involved here.... If the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract.
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> "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions.... But the activities here involved have never been specifically outlawed by Congress. To be sure, the express prohibitions of the Act are not exclusive—if there were any questions of a strategem or device to evade the policies of the Act, the Board hardly would be powerless. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194. But it is clear to us that the Board needs a more specific charter than §8(b)(3) before it can add to the Act's prohibitions here."

It seems absolutely plain to us that *Insurance Agents*

sounds the death knell not only to Board regulation of economic weapons which is not based on a specific Congressional mandate, *see also, American Ship Bldg. Co.* v. *National Labor Relations Board, supra,* 380 U.S. 300, but also to state regulation of those weapons. To say that the Court's declaration that it was beyond the Board's competence to outlaw the so-called partial strike leaves the states free to do so would be absolutely contrary to the logic of *Insurance Agents,* which establishes that strike weapons which were not expressly forbidden were designedly left in the union armory. The decision in *Teamsters Union* v. *Morton,* 377 U.S. 252, 256-257, 259-260 (1964) which rejected the contention that state secondary boycott law could be applied in a damage suit under Section 303 of the LMRA, even though the *Garmon* principle does not apply, confirms our reading of *Insurance Agents:*

> "It is the respondent's contention that since the petitioner union's peaceful conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the National Labor Relations Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this condict. But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien,* 339 U.S. 454, 457. . . . The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines,* 372 U.S. 714, 722."
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> "In this case, the petitioner's request to Launder's management to cease doing business with the respondent was not proscribed by the Act. '[A] union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically

prohibited means of coercion through inducement of employees.' *Carpenters Local 1976* v. *Labor Board, supra,* 357 U.S. at 99. This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761* v. *Labor Board,* 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted §303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy."

In sum, we submit that there is no room for state regulation of the use of peaceful weapons of self-help in a dispute covered by the RLA whether they are deemed protected or unregulated, for any such regulation would infringe upon the system of labor relations established by Congress.

3. *The BRT's Picketing Was Primary Activity And As Such Is Beyond The Reach of State Law.* As we have noted p. 20 *supra,* the Respondent's basic position here is that federal law does not regulate "secondary" activity by a railroad union against a railroad company, that such activity should not be considered lawful on the ground that it was designedly left unregulated, and on this basis argues that the injunction based on state law was properly issued. Neither the Florida courts nor the respondent have seen fit to explain the exact dimensions of the area of "secondary" activity open to state regulation and this is indeed most unfortunate in light of the fact that the primary-secondary dichotomy is perhaps the most complex and difficult concept in labor law and one which must be handled with special care to insure that the basic right to

strike is not undermined. As Mr. Justice Frankfurter observed in *Electrical Workers* v. *National Labor Relations Board (General Electric Co.)*, 366 U.S. 667, 673-674 (1961) on the basis of fourteen years of experience with Section 8(b)(4) of the NLRA:

> "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity.
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> "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line.
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> "However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause.
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> "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply §8(b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience."

We think it plain from such decisions as *Railroad Telegraphers* v. *Chicago & N.W.R. Co., supra,* 362 U.S. 330 and *Locomotive Engineers* v. *Baltimore & Ohio R. Co., supra,* 372 U.S. 284 that the totality of federal railway labor law is, at the very least, as solicitous of the right to engage in primary picketing during a lawful strike over a major dispute as is the NLRA. In other words picketing which this Court has considered to be primary under the NLRA must be considered primary under the RLA and as such clearly beyond the reach of the states. Just as it is beyond the com-

petence of the states to enjoin peaceful concerted activity in furtherance of their conceded jurisdiction over violent activity, *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139 (1957) it is beyond the states' power to enjoin primary picketing directed at railroads even if they have the power to deal with "secondary" activity. Thus, assuming *arguendo* that the states have some jurisdiction in this general area the inquiry narrows to whether the picketing enjoined here was in fact "secondary" activity. We submit that it was not.

The injunction entered by the Florida courts limited the Union to picketing directed at the striker replacement employees of FEC. It barred picketing directed at the employees of the Terminal Co., and other carriers, who were making pickups and deliveries to FEC, or otherwise facilitating the day-to-day operations of the struck carrier, at the situs of the picketing—the general area of the Terminal Co. Thus, the Florida courts took the position that picketing is primary, only if it is directed solely at striker replacement employees who continue to work for the struck employer. On occasion, over a period of many years the lower federal courts and the NLRB took the same view. This history and the reasoning supporting the approach were fully articulated by the Second Circuit in *Carrier Corp.* v. *National Labor Relations Board,* 311 F.2d 135, 146 (C.A. 2nd Cir., 1962), where the court concluded:

> "In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees, prior to the strike, were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and sole, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when

merely incidental to the pursuit of legitimate objectives, *Di Giorgio Fruit Corp.* v. *NLRB*, 89 U.S. App. D.C. 155, 191 F.2d 642 (1951), here involved no such redemptive feature. The actions of the union were thus in violation of §8(b)(4)(i) and (ii)(B) of the Act."

But *Carrier* represented the demise of that view for this Court reversed the Second Circuit in *United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492 (1964). In *Carrier* the Court first reviewed and restated the basic principles it had set out in the *General Electric* (376 U.S. at 492-496):

"Noting the conceded fact that the deliveries and removals by the railroad in this case were made in connection with the normal operations of the struck employer, the Board regarded as dispositive this Court's decision in *Electrical Workers Local No. 761* v. *Labor Board*, 366 U.S. 667, General Electric case.

"The Court of Appeals for the Second Circuit reversed the Board's decision on the ground that the picketing at the railroad gate was directed solely at the neutral railroad employees and could not be regarded as incident to what the court considered the only legitimate union objective: publicizing the labor dispute to the employees involved therein, those working for Carrier. This Court's holding in General Electric was deemed inapposte since the gate in the present case is located on premises belonging to the neutral employer. 311 F.2d 135.

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"The Court accepted the approach neither of the Board nor of the Union [in General Electric]. The location of the picketing, though important, was not deemed of decisive significance; picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties

of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice.

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"It seems clear that the rejection of the Board's position in General Electric leaves no room for the even narrower approach of the Court of Appeals in this case, which is that the picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees. Under this test, no picketing at gates used only by employees of delivery men would be permitted, a result expressly disapproved by the Court in General Electric."

Having done so it then stated its holding in the following terms (*Id* at 499-500):

"*The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer.* But Congress not only preserved the right to strike; it also saved "primary picketing" from the secondary ban. *Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt.* In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the employer's regular operations.

"Nor may the *General Electric* case be put aside for the reason that the picketed gate in the present case was located on property owned by New York Central Railroad and not upon property owned by the primary employer. The location of the picketing is an important but not decisive factor, and in this case we agree with Judge Lumbard that the location of the picketed gate upon New York Central property has little, if any significance:

'In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished. Because the fence surrounding the railroad's right of way was a continuation of the fence surrounding the Carrier plant, there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier.' 311 F.2d 135, 154.

"The railroad gate adjoined company property and was in fact the railroad entrance gate to the Carrier plant. For the purposes of § 8(b)(4) picketing at a situs so proximate and related to the employer's day-to-day operations is no more illegal than if it had occurred at a gate owned by Carrier." (Emphasis added.)

The picketing enjoined here fits squarely within the *Carrier* definition of primary picketing. For it was, as we have just stated, picketing designed to stop pickups from, deliveries to, and other services relating to the day-to-day operations of, FEC at a situs at which that struck railroad was carrying out an integral part of its business. It is true that here as opposed to *Carrier*, the picketing took place at a situs at which activities completely unrelated to the day-to-day operations of the struck employer were also taking place, i.e. a so-called common situs. But that, too, was true in *General Electric* and was not considered a ground for interdicting picketing that was directed at those day-to-day activities—and *Carrier* builds on and clarifies the principles of General Electric.

It is true also that while the picketing here as in *Carrier* was not intended to interfere with operations other than

those of the struck employer, in the instant case as opposed to *Carrier*, it did have a limited effect on the operations of the other railroads sharing the site with the FEC. But it is intent not effect which is the touchstone, "however severe the impact of primary activity on neutral employers it [is] not thereby transformed into activity with a secondary objective," *National Woodwork Mfrs. Assn.* v. *National Labor Relations Board*, 386 U.S. 612, 627 (1967), *see also, General Electric*, 366 U.S. at 673-674, *Houston Contractors Assn.* v. *National Labor Relations Board*, 357 F.2d 182, 187 (C.A. 5th Cir., 1966) *affirmed on this point* 386 U.S. 664 (1967). The principles of *Carrier* continue to be applicable where the struck employer intertwines his activities with the activities of others as *General Electric* demonstrates. Thus it is plain that the result of *Carrier* would have been the same if the Carrier plant had been in an industrial park shared by a number of unstruck plants served by a single railroad spur. If this were not true the prohibition of the secondary boycott would be transmuted into exactly the "clear invasion on traditional primary activity" *General Electric*, 366 U.S. at 681, that this Court has refused to countenance. For the theory of *Carrier* is that it is legitimate primary activity to attempt to shut down a struck operation by picketing designed to stop pickups and deliveries, or the rendation of other services, needed to keep that operation going. Thus as long as the picketing union restricts itself to that course and takes reasonable steps designed to guard against the involvement of the tenants of the common situs whose operations are not related to the struck employers its picketing is legal under *National Woodwork, cf. Seafarers Union* v. *National Labor Relations Board*, 265 F.2d 585 (C.A. D.C. Cir., 1959), *see also, Sailors Union of the Pacific (Moore Drydock Co.)* 92 NLRB 547 (1950). The BRT compiled with this requirement here. Its signs identified the struck employer, its picket lines did not cut tracks used exclusively by

nonstruck carriers, and it indicated that if sufficient time for the picketing to hit its stride had been allowed, it was willing to take such steps as removing its picket lines from time to time so as to allow train movements not connected with the FEC.

In sum, we suggest that there is no rational distinction between the picketing in the instant case and the picketing authoritatively designated as primary by this Court in *Carrier*. Thus, if the Court should choose not to reach the question of whether the states are completely ousted from the regulation of peaceful picketing covered by federal railway labor law, we submit that it should hold that they cannot enjoin primary picketing by railroad unions and find that the picketing here was in fact primary.

CONCLUSION

For the foregoing reasons as well as those stated by the Petitioners the decision below should be reversed.

Respectfully submitted,

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